

DEPARTMENT OF STATE
Washington

February 19, 1958

State Dept. declassification & release instructions on file

Mr. Walter C. Sauer
Executive Vice President
Export-Import Bank of Washington
Washington 25, D. C.

Dear Mr. Sauer:

In your letter of November 19, 1957, addressed to Mr. Staats, Executive Officer, Operations Coordinating Board, you raised the question as to whether loans under section 104(e) of P. L. 480 would be barred to Finland because of the provisions of the Mutual Defense Assistance Control (Battle) Act. This letter has been referred to me for reply and, after consulting the Office of the Legal Adviser of the Department of State, I advise the Bank that certain types of loans would not constitute "assistance" within the meaning of the Battle Act, while there are others which might well fall within the proscription of the Battle Act.

Attached hereto I am providing you with a copy of Mr. Metzger's memorandum to me which explains in detail the differences in types of transactions and loans which might be dealt with differently in given cases.

Under these circumstances whenever in the future you provide me with the essential facts on any prospective loan, I will be prepared to advise the Bank promptly with respect to the applicability of the Battle Act. It is my understanding that my letter to you dated February 13 provided you with information regarding the only transactions under current consideration by the Bank.

Yours very truly,

W. S. DeLany
Deputy Administrator for the
Mutual Defense Assistance Control Act

The Legal Adviser

February 14, 1958

TO: E/MDAC - Admiral Delany
FROM: L/E - Mr. Metzger
SUBJECT: Battle Act and the Cooley Amendment

Reference is made to your memorandum of February 6, 1958, in which you enclose a letter from the Eximbank to Mr. Staats dated November 19, 1957, raising the question whether Section 104(e) (Cooley Amendment) loans would be barred to Finland because of the provisions of the Battle Act.

Section 104(e) of Public Law 480 of the 83d Congress, as amended in 1957, authorizes foreign currency loans to private business, such loans to be made by the Eximbank from portions of the foreign currencies which accrue to the US as a result of sales of surplus agricultural commodities for foreign currency. Under the Cooley Amendment such loans may be made to "US business firms and branches, subsidiaries, affiliates of such firms for business development and trade expansion in such countries." Loans also may be made under that section to domestic or foreign firms for the establishment of facilities for aiding in the utilization, distribution, or otherwise increasing the consumption of, and markets for, US agricultural products.

The determination of what constitutes "assistance" by the US to a nation which knowingly permits the shipment of designated materials to prohibited destinations, which is forbidden under Section 103(b) of the Battle Act, in that wide borderland area between a grant to the nation itself (which is obviously "assistance") and "activities carried on for the purpose of facilitating the procurement of materials in which the US is deficient" (which Sec. 105 of the Battle Act states is not "assistance"), is difficult. The Congress made no effort at further definition. Hence, the Executive has had the task of analyzing each type of problem, and even individual cases where a general type was not susceptible of easy generalization, as it arose and in the context of evolving conditions. In this process of analysis, the purpose of the statute as a whole, and its common-sense application in the light of the specific intention of the Congress in Section 105 to eliminate from the concept of assistance those activities which are clearly primarily for the benefit of the US, even though there is an incidental or secondary benefit to the receiving nation, must play a prominent part. What has been and is involved, therefore, is a weighing of factors, a balancing of interests which may at times be competing. There is nothing new in the technique: this is the daily grist of statutory interpretation problems in administrative and judicial tribunals.

In our memorandum to you of February 10, 1958, we pointed out that Eximbank activity is of two types: (1) to provide exporter credits and (2) to make loans for development of the economies of foreign countries. We stated that for purposes of the Battle Act there is a distinction between these activities. In the case of exporter credits, the primary purpose is to maximize exports of US products, whereas in the case of development loans the purpose primarily is to

improve the economic situation of the foreign country. Thus, while the dominant immediate purpose in the case of exporter credits is to promote US exports, the benefit to the US export trade in the case of the latter is a secondary factor, the primary purpose being to assist in the economic development of a foreign country. This is not to say that in the case of exporter credits some incidental benefit may not be derived by the foreign country, but the emphasis is on assisting the US domestic exporter and thus promoting the export trade of the US. We pointed out that the Eximbank exporter credit is very similar to the CCC type of credit to American exporters of surplus agricultural commodities which has been held not to constitute "assistance" within the meaning of the Battle Act. It may be noted that such credit as CCC extends is to the US domestic exporter in order to aid him in making necessary arrangements with the foreign importer. While this would permit the US exporter to extend a short period of credit to the foreign importer and thereby give him time to sell the commodities and make payments, the sales are made without regard to the need of the importing country for economic aid, and are in fact made on the same terms irrespective of which country is importing.

In considering the matter of loans in the context of the Cooley Amendment, your attention is invited to the fact that this provision allows the making of two types of loans. Loans can be made to US business firms and branches, subsidiaries or affiliates of such firms in the foreign country concerned, for business development and trade expansion in that country. In addition, loans can be made to US as well as to foreign firms for the establishment of facilities for aiding in the utilization, distribution, or otherwise increasing the consumption of markets for US agricultural products.

1. The latter type of loan appears to envisage activities very similar to those involved in the CCC credit transaction, under which credit is extended for a period of up to three years to US exporters of agricultural commodities from its stock, and those involved in Eximbank exporter credits. In short, loans under the Cooley Amendment to either US firms or foreign firms to be used in effect for the purpose of maximizing exports of US agricultural commodities to a country concerned, appear to be intended primarily as an aid in the domestic export and sale of surplus agricultural commodities. Accordingly, loans under that clause of the Cooley Amendment which in fact were primarily to increase export of US commodities would not be considered as furnishing assistance to another country. It is difficult, however, because of the loose language of the clause to generalize since particular cases might show that other objectives are in fact dominant. Consequently, it will be necessary to make a judgment on individual cases as they arise.

2. Loans to US business firms for their development and trade expansion on the other hand, could well constitute "assistance" under the Battle Act since such loans do not appear, from the language or purpose of the pertinent clause of the Cooley Amendment to have for their purpose maximizing US exports, although such loans may incidentally assist in expanding US exports. It is our understanding that the loan proceeds may be expended in any way which would contribute to the purposes of the clause, including expenditure for labor costs, construction material and supplies, and raw materials and equipment, which, by and large, might be rendered or acquired wholly in the country in which the particular US business enterprise is located. Thus, loans of this type might well fall within the proscription of the Battle Act since they would appear to have a primarily beneficial effect upon the economic development of the foreign country concerned, like development loans of the Eximbank. However, in some individual cases

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may disclose that a particular loan will have a purpose and effect which primarily benefits the US export trade.

The foregoing analysis is intended to provide your office with a general outline of the problem. As stated, each loan application would need to be examined in the light of the standards set forth; whether the Battle Act would stand in the way of any particular loan would have to be considered at the time an application is made on the basis of all the available information and circumstances.

There would be no legal objection to incorporating in a sales agreement with a Battle Act country a provision that a certain portion of the foreign currency accruing to the US as a consequence of the sales made pursuant to a particular agreement, will be used for loans for Cooley Amendment purposes. No Battle Act problem would arise at that time inasmuch as the Battle Act relates to the actual granting of assistance, while the proceeds of the sales agreement may not necessarily be applied to all of the uses specified in such agreement. Amendments have frequently been made in such agreements to provide for other uses which are specified in Section 104 of P.L. 480. But the Battle Act question would have to be considered when applications for particular loans are made to the Eximbank and it is at that time that the matter regarding specific loans should be referred to this office for consideration with you.